Supreme Court, U. S.
FILED
DEC 5 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1979

No. 79-327

CBS INC.,

Petitioner,

v.

UNITED STATES OF AMERICA and
NATIONAL BROADCASTING COMPANY, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Of Counsel:

CRAVATH, SWAINE & MOORE
One Chase Manhattan Plaza
New York, N. Y. 10005

WILMER & PICKERING
1666 K Street, N.W.
Washington, D.C. 20006

ROBERT S. RIFKIND
GEORGE VRADENBURG III
STUART W. GOLD
HENRY B. GUTMAN
L. DONALD PRUTZMAN, JR.
One Chase Manhattan Plaza
New York, N.Y. 10005

JOHN D. APPEL
CBS Inc.
51 West 52nd Street
New York, N.Y. 10019

JOHN H. PICKERING
1666 K Street, N.W.
Washington, D.C. 20006

Attorneys for Petitioner

December 5, 1979

INDEX

	Page
1. Respondents' Claim That CBS Has No "Interest" as a Buyer and Producer of Programs Entitling It to Intervention as of Right	3
2. Respondents' Claim That CBS's Ability to Protect Its Interests Would Not Be Impaired as a Result of Entry of the Decree	4
3. Respondents' Claim That the Department of Justice Could Adequately Represent the Interests of CBS, Its Target in an Identical, Pending Litigation	7
Conclusion	8

CITATIONS

CASES:

Atlantis Development Corp. v. *United States,* 379 F.2d 818 (5th Cir. 1967)	7
Cascade Natural Gas Corp. v. *El Paso Natural Gas Co.,* 386 U.S. 129 (1967)	4
Denver & R.G.W.R. Co. v. *United States,* 387 U.S. 485 (1976)	6
New York Public Interest Research Group, Inc. v. *Regents of the University of New York,* 516 F.2d 350 (2d Cir. 1975)	7
Nuesse v. *Camp,* 385 F.2d 694 (D.C. Cir. 1967)	7
Trbovich v. *United Mine Workers,* 404 U.S. 528 (1972)	8

STATUTES AND RULES:

15 U.S.C. § 16	2, 8, 9
FED. R. CIV. P. 24	2, 8

IN THE

Supreme Court of the United States

October Term, 1979

No. 79-327

—0—

CBS INC.,

Petitioner,

v.

UNITED STATES OF AMERICA and
NATIONAL BROADCASTING COMPANY, INC.,

Respondents.

—0—

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The briefs of both the United States and NBC in opposition* mischaracterize CBS's position. In particular, the Government repeatedly asserts that CBS complains that the proposed decree "went too far". (U.S. Br., pp. 3, 8) Similarly, NBC ascribes to CBS the view that the decree restricts NBC "too much". (NBC Br., p. 4)

The Government is apparently unwilling to face CBS's actual charge that the decree is demonstrably *anticompetitive* and hence itself violative of the procompetitive policy of the Sherman Act. CBS charged that the proposed decree was calculated to suppress competition, *inter alia,* by restricting NBC as a potential source of supply of television programming; that the Antitrust Division sought such a decree to "improve the lot" and enhance the rev-

* Those briefs are referred to herein as "U.S. Br." and "NBC Br.", respectively.

enues of program suppliers; and that a decree achieving that result was diametrically opposed to the Antitrust Division's mandate under the Sherman Act. In short, unlike virtually all other critics of government consent decrees, CBS did not urge that the decree accomplished too little or too much, but rather, more fundamentally, that the Antitrust Division had run amok and, faithless to the statute it was ostensibly enforcing, sought to drive up prices by curtailing potential production.

Because CBS is a major buyer in the relevant market with a direct, pocketbook interest in maximizing competitive sources of supply, it sought to intervene in order to demonstrate that a consent decree fashioned in this manner could not meet the public interest standard under the APPA (15 U.S.C. § 16(b)-(h)) and must, therefore, be rejected by the District Court. In support of its motion to intervene, CBS filed extensive affidavits of distinguished economists demonstrating the anticompetitive nature of the proposed consent decree. Those affidavits have never been rebutted. It is sufficient to emphasize here, however, that given the gravamen of CBS's pleading in intervention—that the Department here sought to suppress competition—the Ninth Circuit's holding that CBS's motion to intervene failed under Rule 24(a)(2), FED. R. CIV. P., because CBS was "adequately represented" by the Department is palpably erroneous. The Government's mischaracterization of CBS's position is thus simply an attempt to gloss over the fundamental issue presented. When, under the banner of the Sherman Act, the Department sets out to suppress competition, it cannot possibly be deemed an adequate representative of those with a direct interest in a competitive market.

Respondents' extraordinary misconstruction of the nature of CBS's grievances permeates their briefs in opposition and, once properly exposed, highlights CBS's entitlement to intervention.

1. Respondents' Claim That CBS Has No "Interest" as a Buyer and Producer of Programs Entitling It to Intervention as of Right.

The Government asserts that "CBS's interest as a buyer 'in preserving competition among program sellers' . . . [is] no different from the general public interest in effective competition in this market." (U.S. Br., p. 5) It cites no support for this proposition, and it simply does not make sense. Certainly CBS's interest as a direct and major purchaser of programs, whose profits are intimately related to program costs, is far more specific and compelling than that of the general public.

It is noteworthy that the Court of Appeals never reached CBS's claim of specific interest, and that the District Court appears to have disposed of it on the erroneous ground that CBS had not made a "conclusive showing on the present record" of the anticompetitive nature of the proposed decree.*

The cases cited by respondents in support of the proposition that CBS's interest is not sufficient for intervention as of right without exception involved a contention by the prospective intervenor that the relief agreed to by the Government was insufficient to restore or maintain competition in the industry involved. (U.S. Br., p. 6) Not a single one of them involved, as here, a well-pleaded (and documented) contention that the decree attacked would create a new and affirmatively anticompetitive regimen *in violation of* the antitrust laws.

---

* As demonstrated in the Petition (pp. 17-19), this requirement of a "conclusive" and "compelling" showing of interest is completely without foundation or support. The Court of Appeals did not address it and respondents here do not attempt to support it.

In contrast to the cases cited by respondents, CBS's showing of interest here was stronger than that in *Cascade Natural Gas Corp.* v. *El Paso Natural Gas Co.*, 386 U.S. 129 (1967)—where this Court squarely upheld intervention as of right by purchasers who contended that a proposed decree would not restore competition among suppliers.*

Respondents also fail to recognize that CBS's interest in this case was not solely that of a potential program buyer. For the Government seeks in *United States* v. *CBS Inc.*, Civil No. 74-3599-RJK (C.D. Cal.), a companion case involving identical issues before the very same Judge, to restrict CBS's production of programs for its own use. In such circumstances, CBS had a strong additional interest, as a producer of its own programs, in forestalling judicial approval—in a non-adversary context—of the Department's theory of the case and its proposed anticompetitive restrictions on network program production. Such approval could not help but adversely affect the Judge's perception of the merits of CBS's own case.

2. Respondents' Claim That CBS's Ability to Protect Its Interests Would Not Be Impaired as a Result of Entry of the Decree.

Respondents argue that CBS has failed to show that disposition of the action without intervention would as a practical matter impair its ability to protect its legitimate interests, since the provisions of the decree to which CBS objects would not take effect until and unless the Government

* The Government argues that lower courts have interpreted *Cascade* "as allowing intervention only to insure compliance with an earlier mandate". (U.S. Br., p. 7) While it would be presumptuous to inform this Court as to how it interprets its own decision, it is clear that none of the lower court cases cited by the Government involved any contention that the decree itself would create a new anticompetitive result.

obtains similar relief from CBS. (U.S. Br., p. 6 n.7; NBC Br., p. 14) While the District Court endorsed this position (App. II A-15 to A-16), the Court of Appeals did not reach it. (App. II A-22 to A-23)*

That argument is clearly misplaced and incorrect. In the first place, under the APPA the District Court had to determine whether the decree in its entirety was "in the public interest" as a condition precedent to its entry. Indeed, the District Court has now held that the decree satisfies the public interest standard without qualification or caveat. It would obviously have been wholly inappropriate for the District Court to have made that determination if, for whatever reasons, it was not satisfied on the question and was relying, sub silentio, on the possibility that further proceedings in *United States* v. *CBS* or *United States* v. *ABC* would resolve the doubt or preclude the operation of some provisions in the *NBC* decree. It cannot be assumed that the District Court engaged in a purely hypothetical exercise when it held that entry of the *NBC* decree was "in the public interest". It therefore follows that proceedings with respect to the decree in this action are the proper occasion to determine whether this decree does violence to the public policy declared by the Sherman Act as CBS claims. Where, as here, anticompetitive effects of grave significance

* The Government urges that it was proper for the District Court to deny permissive intervention because "since NBC and the Government were about to settle their case, the result of intervention by a party hostile to the decree would most likely be delay". (U.S. Br., pp. 8-9) Yet if avoidance of "delay" is an important consideration, it hardly lies in the Government's mouth to argue that nothing of moment will occur until after a final decision favorable to it in *United States* v. *CBS*.

Furthermore, under Section VII of the proposed decree, some of its provisions go into effect promptly after its entry. (Sections IV(A) and (B); VI(A), (B), (D), (E) (ii) and (iii)) See Appendix to CBS's petition for writ of certiorari in *CBS Inc.* v. *United States District Court for the Central District of California (Kelleher, D.J.), et al.* (No. 78-1685) ("App. I"), pp. 20a-37a.

to CBS are demonstrated, that determination cannot be deferred to another proceeding at another time. *See Denver & R.G.W.R. Co.* v. *United States,* 387 U.S. 485, 501-07 (1967).

In the second place, respondents' position ignores basic realities of the marketplace. With respect to the restrictions imposed on NBC's production of its own programs, it is true that NBC now produces very little programming. However, its preservation as a potential competitor in the production of programming is essential to the maintenance of a competitive market. Surely NBC will now be more cautious about committing large amounts of capital to programming or program production facilities with this Damoclean injunction dangling overhead. Equally important, the decree must diminish NBC's role as a perceived potential entrant since independent producers will recognize that NBC is now less likely to invest in expanded production efforts.

With respect to the decree's restrictions on the terms which NBC is free to negotiate with program suppliers, the District Court's imprimatur also increases the likelihood that the restrictions in the decree will be cited as the "legal norm" in future negotiations by suppliers with all of the networks. Thus, irrespective of whether it ever goes into force, the mere existence of such a judicially approved decree may adversely affect CBS's ability to acquire programs on freely negotiated terms.

In the third place, respondents ignore the unusual *stare decisis* effect which was likely to emanate from a later determination that the proposed decree was in the public interest, in a companion case involving the same plaintiff, the same issues and the same Judge. In this case, indeed, the District Court ultimately approved the decree in a lengthy opinion in which—without the benefit of any adversary litigation—it made various unfounded pronouncements, without evidentiary support, and considered restraints on production and on free negotiation of contractual terms to be "in the public interest" as declared in the Sherman Act. (App. I 80a)

The upshot is that CBS is now placed in the unenviable position of attempting to convince the same District Judge that its case is different from *United States* v. *NBC* although all concerned concede the complaints are identical. The Judge, having found that relief consistent with the Government's theory of liability is in the public interest, has necessarily at the least expressed the view that the status quo which CBS defends is *not* in the public interest. Thus, without any chance to participate or appeal, the ability of CBS to defend *United States* v. *CBS* has indeed been impaired. The practical adverse *stare decisis* impact emanating from the Court's denial of intervention is patent. *See Atlantis Development Corp.* v. *United States,* 379 F.2d 818 (5th Cir. 1967); *Nuesse* v. *Camp,* 385 F.2d 694 (D.C. Cir. 1967); *New York Public Interest Research Group, Inc.* v. *Regents of the University of New York,* 516 F.2d 350 (2d Cir. 1975).

3. Respondents' Claim That the Department of Justice Could Adequately Represent the Interests of CBS, Its Target in an Identical, Pending Litigation.

Finally, respondents lamely argue that the Government was in a position adequately to represent CBS's interests in negotiating the terms of the *NBC* decree. The Government's contention appears to be derived from nothing more than its manifestly erroneous conclusion that CBS has no interest distinguishable from that of a member of the public. (U.S. Br., p. 6) It completely overlooks both CBS's interest as a program buyer in avoiding a decree imposing anticompetitive supply conditions and its interest as a liti-

gant in avoiding the stacked-deck precedent proposed by its "protector", the Department of Justice. (See p. 6-7, *supra*)

More generally, the Government's platitudinous assertion (U.S. Br., p. 6) that "Congress has vested in the United States, not private parties, the representation of the public interest" and that the United States "must alone speak for the public interest" leaves no room whatever for the APPA, which placed ultimate responsibility for determining the public interest in the district courts —aided by various procedures outlined in the Act, including intervention. The APPA and Rule 24 are, of course, peculiarly significant where, as here, there is a bona fide and well documented claim that the Antitrust Division has acted to subvert the purposes of the antitrust laws.

In short, for all the reasons discussed in the Petition at 19-23, CBS more than satisfied the "minimal burden" of showing that the Government's representation of its interests was inadequate. *See Trbovich* v. *United Mine Workers*, 404 U.S. 528 (1972).

CONCLUSION

This petition presents novel and important questions concerning the proper interpretation and application of the APPA and the method of review of district court determinations thereunder. The APPA, a new piece of remedial legislation, is designed to promote the procompetitive objectives of the antitrust laws and to end "judicial rubber stamping" of consent decrees in government antitrust cases.

Here the proposed decree was shown by unchallenged affidavits to be—and is on its face—an arrangement calculated to drive up the price of television programs by, *inter alia*, curtailing production and restricting freedom of negotiations. Had it been an agreement between purely private parties, it would be clearly seen as a classic cartel arrangement.

Notwithstanding such a formidable showing, the District Court denied CBS's petition for intervention on the theory that the Antitrust Division adequately represented whatever interests CBS had, and ultimately approved the decree on the ground that this was what the Division wanted—all in the best traditions of "rubber stamping". That court's actions strongly suggest that the broadly remedial purpose of the APPA can, and hereafter will, be all too easily frustrated, unless appropriate guidance from this Court is promptly obtained.

We accordingly respectfully urge that the petition for certiorari be granted.

December 5, 1979

Respectfully submitted,

ROBERT S. RIFKIND
GEORGE VRADENBURG III
STUART W. GOLD
HENRY B. GUTMAN
L. DONALD PRUTZMAN, JR.
One Chase Manhattan Plaza
New York, N. Y. 10005

JOHN D. APPEL
CBS Inc.
51 West 52nd Street
New York, N. Y. 10019

JOHN H. PICKERING
1666 K Street, N.W.
Washington, D.C. 20006

Attorneys for Petitioner

Of Counsel:

CRAVATH, SWAINE & MOORE
One Chase Manhattan Plaza
New York, N.Y. 10005

WILMER & PICKERING
1666 K Street, N.W.
Washington, D.C. 20006